89-1180

No. _____

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JERRY RUSSELL, JR., PETITIONER

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

The question presented in this case is whether the Secretary of Health and Human Services should be permitted to ignore his own regulations pertaining to the withholding of attorney's fees from past due Title II Social Security disability cases.

TABLE OF CONTENTS

Page

Opinions below.....1

Jurisdiction.....2

Statutes involved.....2

Statement.....2-5

Reasons for granting the petition....5-12

Conclusion.....12

Appendix 13-27

TABLE OF AUTHORITIES

Cases — Page

Avon Davis v. Secretary of HHS, U.S.C.A. No. 89-1042, decided 10/25/89.....11

Cash v. Califano, 621 F. 2d 626, 628 (1980).....9

Chevron Oil Co. v. Hunson, 404 U.S. 97 (1971).....9

Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988).....5

Hillhouse v. Harris, 715 F. 2d 428 (8th Cir. 1983)....8

Trekas v. Secretary of HHS, No. 88-2069 (Sup. Ct. 1988).....11

Other: — Page

20 C.F.R. § 404.501 (a) (8).....11
20 C.F.R. § 1720 (b) (4).....11
20 C.F.R. § 1730 (b).....11
42 U.S.C. § 404.....6

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JERRY RUSSELL, JR., PETITIONER

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Anthony W. Bartels petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is attached hereto as Appendix A. The opinion of the district court is unreported, but is attached hereto as Appendix B. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on October 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 20 C.F.R. § 404.1720 (b) (4), 20 C.F.R. § 1730 (b), and 20 C.F.R. § 404.501 (a) (8), are set forth in the Appendix D.

STATEMENT

This case concerns 20 C.F.R. § 1720 and 1730, which involve fees for a representative's services on a Title II claim. In a Title II claim, the Social Security Administration is to withhold and pay the attorney's fee directly to the attorney from a claimant's past due benefits. The case also concerns 20 C.F.R. § 404.501 (a) (8), which provides

for adjustment in cases where, through error, a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of attorney's fees payable directly to an attorney under section 206 of the Act.

1. In this case, petitioner (hereinafter claimant) had an attorney, Anthony W. Bartels who represented the claimant at the administrative level and at the Court level.

On July 6, 1988, the District Court denied Bartels' motion for attorney's fees under the Social Security Act because on 8/12/87 Bartels had been awarded $1,688.66 in fees and expenses pursuant to the Equal Access to Justice Act.

On 6/28/88 Bartels petitioned the Social Security Administration (SSA) for a fee of $5,153.80, which represented one-fourth of claimant's retroactive and interim benefits combined. On 9/19/88 Bartels was authorized to charge $3,000.00

for an administrative fee. He was advised, however, that the Secretary had inadvertently released all past-due benefits to the claimant, and, since the claimant was deceased at the time the administrative fee was authorized, Bartels must seek payment of the fee from claimant's estate.

Anthony Bartels subsequently asked that the Social Security Administration declare an overpayment, pay the balance of his fee, and collect the overpayment from the claimant's estate, pursuant to 20 C.F.R. § 404.501 (a) (8). The Secretary refused to do so.

Bartels, seeing no other remedy open to him, filed a motion to hold the Secretary in contempt of court on 12/28/88. On 4/17/89 the U. S. District Court entered an Order denying Bartels' motion.

Bartels appealed to the U. S. Court of Appeals for the Eighth Circuit, asking

that the Court require the Secretary to pay the attorney's fee he had authorized and pursue collection of the overpayment from the deceased claimant's estate. Bartels also asked that the Court retroactively apply the case of Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988), which held that interim benefits were to be included in the calculation of attorney's fees.

On 10/12/89, the U. S. Court of Appeals declined to hold the Secretary in contempt of Court because no court order directing payment of a fee to Bartels existed, and thus the Secretary had violated no order (Appendix A).

Bartels' Petition for Rehearing was denied on 11/21/89, by reason of the lack of a majority of the active judges voting to rehear the case en banc (App. C).

REASONS FOR GRANTING THE PETITION

1. The basis for this Petition is to direct the Court's attention to actions of

the Secretary of Health and Human Services, who, in this case, has ignored his own regulations pertaining to the withholding of attorney's fees from past due Title II Social Security disability cases.

The Secretary, in error, released all retroactive and interim benefits to the claimant in this case, prior to the withholding of attorney's fees. In such a situation, the Secretary would ordinarily pay the attorney's fee, then recoup the overpayment from the claimant pursuant to 42 U.S.C. § 404, which deals with overpayments. However, in this instance, the claimant was deceased by the time the administrative fee was authorized; thus, the Secretary had no future funds for this claimant from which to recoup the overpayment. So, the Secretary refused to follow 42 U.S.C. § 404, and thus, the attorney was left with no remedy to collect his attorney's fee, except to seek

a contempt citation against the Secretary for failure to follow his own regulations.

The U. S. Magistrate noted in her findings and recommendations that this problem was a direct result of the Secretary's error. Although the District Court sympathized with Bartels' plight, it held that there did not appear to be an adequate solution for this particular situation, and so denied the contempt motion.

The U. S. Court of Appeals for the Eighth Circuit declined to hold the Secretary in contempt, because no court order existed ordering the Secretary to pay attorney's fees. Bartels maintains, however, that the Secretary should be held in contempt for failure to follow his own regulations.

The fact that the defendant/appellee in this case is the Secretary of HHS, does not exempt him from the contempt process.

In Hillhouse v. Harris, 715 F. 2d 428 (8th Cir. 1983), the Court stated:

> " . . . [W]e note the Secretary continues to operate under the belief that she is not bound by district or circuit court decisions. In its findings the Appeals Council states, 'the Secretary is bound only by the provisions of the Social Security Act, regulations and rulings, and by United States Supreme Court decisions. A district or circuit court decision is binding only in the specific case it decides.' 547 F. Supp. at 92 . . . . "
>
> ". . . and the Secretary will ignore the principle at his peril."

A concurring opinion is even more strongly worded:

> " . . . While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite a confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities."

Hillhouse at page 430.

The Court of Appeals declined to address Bartels' request that the Gowen case be applied retroactively. Bartels maintains that the Gowen decision should be applied retroactively to this case.

"A general rule in Anglo-American jurisprudence is that judicial decisions are to be applied retroactively. . . The concept stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been." Cash v. Califano, 621 F. 2d 626, 628 (1980). Since usual procedure requires decisions to be applied retroactively, the refusal of a Court to do so is the exception as opposed to the rule. In Chevron Oil Co. v. Hunson, 404 U.S. 97 (1971), the Supreme Court presented a three part test in determining whether a decision should be refused retroactive application:

1. "The decision to be applied nonretroactively must establish

> a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly preshadowed."
>
> 2. The Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and affect, and whether retrospective operation will further or retard its operation."
>
> 3. Finally, the Court must weigh the "inequity imposed by retroactive application, for '[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the injustice or hardship by a holding of nonretroactivity.'"

Id at 106-107.

Retroactive application of the Gowen case would be appropriate here.

In this case the Secretary failed to withhold sufficient funds to pay plaintiff's fee in this case, which is a violation of his own regulations. The Secretary of HHS Bartels' right to due process of law by releasing his money to

the claimant as an underpayment, and then by refusing to follow 20 C.F.R. § 404.501 (a) (8), 20 C.F.R. § 404.1720 (b) (4) and 20 C.F.R. § 404.1730 (b).

This same issue was brought before the Supreme Court in the case of Clifford Trekas v. Louis W. Sullivan, Secretary of Health and Human Services, No. 88-2069, but the Court declined to hear that case. Yet, on numerous occasions, the Secretary has continued to release all funds to the claimants prior to withholding attorney's fees from retroactive benefits and interim benefits.

The petitioner in this case has also petitioned this court for a writ of certiorari to the U. S. Court of Appeals for the Eighth Circuit on another case very similar to the instant one. That case is Avon Davis v. Secretary of HHS, U. S. Court of Appeals for the Eighth Circuit Number 89-1042, decided 10/25/89.

The Secretary should be instructed to follow his regulations regarding withholding attorney's fees from a claimant's past due benefits before releasing everything to the claimant, and to follow his regulations regarding collection of overpayments. The Secretary could correct his error by paying the attorney's fee, and then recouping the overpayment from the deceased claimant's estate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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January 11, 1990.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 89-1714

JERRY RUSSELL, JR., APPELLANT

V.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLEE

**APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS**

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM

Anthony Bartels appeals from the district court's[1] order denying his motion

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1. The Honorable H. Franklin Waters, United States District Judge for the Western District of Arkansas.

to hold the Secretary of Health and Human Services (Secretary) in contempt for failing to pay the attorney fees awarded following a proceeding to reinstate social security benefits. We affirm the district court's ruling.

Bartels served as counsel to Jerry Russell in the proceeding to terminate Russell's disability benefits. Following the successful reinstatement of Russell's benefits, Bartels filed a motion for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (1) (A) (1982) ("EAJA"). The district court entered an award for $1,688.66, under the EAJA, which represented only Bartels' time for legal work performed before the district court. Bartels later moved for a fee award under 42 U.S.S. § 406 (b) (1) (1982), but the district court denied the motion, noting that Bartels had already received a fee award under the EAJA. Bartels then applied for a fee award under 42 U.S.C. §

406 (a), which allows the Secretary to authorize an award for administrative work performed by an attorney in a social security proceeding. The Secretary authorized an award of $3,000 for Bartels under this section.

The fee award notice sent by the Secretary informed Bartels that Russell, his client was deceased. The Secretary noted that the money which should have been withheld from Russell's benefit payments in order to cover a fee award[2]

---

2. The fee awarded an attorney under section 406 is paid out of any past-due benefits to which the claimant is entitled. See 42 U.S.C. § 406 (a), (b); 20 C.F.R. § 404.1720 (b) (4) (1988).

had been inadvertently released to Russell. The Secretary suggested Bartels recover the award from his deceased client's estate, which Bartels unsuccessfully attempted. Bartels then moved the district court for an order holding the Secretary in contempt for non-payment of fees.

The district court denied Bartels' motion, refusing to issue the contempt citation. The district court determined it lacked jurisdiction in this matter, since no court order directing payment of the fee existed, and thus, no court order was violated by the Secretary. In addition, even assuming it had jurisdiction, the district court determined no remedy was available. Bartels appeals from this ruling.

The district court's conclusion that it lacked jurisdiction in this case is correct. Civil contempt is available only where a court order exists and can be

enforced. Finney v. Arkansas Bd. of Corrections, 505 F. 2d 194, 213 (8th Cir. 1974). No order directing the Secretary to pay Bartels' fees exists in this case, so therefore, the contempt sanction is unavailable. Bartels relies on Motley v. Heckler, 605 F. Supp. 88 (W.D. Va. 1985), rev'd, 800 F. 2d 1253 (4th Cir. 1986), to support his argument that the Secretary is required to "make him whole." Motley is inapplicable to this case, however since it involves the application of 42 U.S.C. § 406 (b), under which the district court can enter an order for attorney fees. This case, in contrast, involves section 406 (a), which only authorizes the Secretary to award fees. We have previously stated that fee awards made by the Secretary are not subject to the district court's review. Copaken v. Secretary of Health, Educ. & Welfare, 590 F. 2d 729, 731 (8th Cir. 1979) (agency fee determinations committed to agency

discretion and not judicially reviewable). If the Secretary's fee awards are not judicially reviewable, the district court likewise has no authority to force the Secretary to comply with an award the court did not issue.

The district court also concluded that, assuming it had jurisdiction under the facts of this case, no remedy was available. Bartels apparently seeks an order requiring the Secretary to pursue collection of his fees from Russell's estate. The Secretary's recoupment powers are limited, however, by 42 U.S.C. § 404 (b): "[T]here shall be no * * *recovery by the United States from, any person who is without fault if such * * * recovery would defeat the purpose of this title or would be against equity and good conscience." Neither party alleges any "fault" attributable to Russell which would allow

the Secretary to pursue recoupment.[3]

Finally, as the district court noted, even assuming it had jurisdiction in this case, there is no waiver of immunity that allows the Secretary to pay this fee. Since no funds are left for payment to Russell, ordering the Secretary to pay Bartels' award would require payment out

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3. The Secretary's regulations allow withholding twenty-five percent of the claimant's past-due benefits for payment of a fee award for approximately ninety days after a favorable determination is issued. If no request for a fee award is received, the withheld benefits are paid to the claimant. See 20 C.F.R. § 404.1730 (C) (2) (i). Once the withheld benefits are released, collection of the fee, which still must be approved by the Secretary, is between the claimant and the attorney. Id. at (c) (2) (ii). Bartels applied for a section 406 (b) fee in May, 1988, but the record indicates the Secretary "inadvertently" released the withheld benefits in January, 1987. It is unclear from the record when Russell's benefits were successfully reinstated, and whether the Secretary released the withheld benefits earlier than its regulations provide.

of general social security funds. The United States is not liable for such a payment absent a specific waiver of sovereign immunity. See Ruckelshaus v. Sierra Club, 463 U. S. 680, 685 (1983). Section 406 contemplates payment of the fee award by the claimant, out of past-due benefits, rather than by the government, out of general funds. Thus, 42 U.S.C. § 406 cannot be construed as a waiver of immunity. See Roberts v. Schweiker, 655 F. Supp. 1105, 1110 (D. De. 1987) (recovery of fee award available only from claimant's estate since section 406 not a waiver of immunity.)

We decline to address Bartels' request that our decision in Gowen v. Bowen, 855 F. 2d 613 (8th Cir. 1988) be applied retroactively, since the only issue before us is Bartels' contempt motion. We therefore affirm the order of the district court denying the motion to find the Secretary in contempt.

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

[To be published.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Civil No. 84-3010

JERRY RUSSELL, JR., PLAINTIFF

V.

SECRETARY OF HEALTH
AND HUMAN SERVICES, DEFENDANT

[FILED APRIL 17, 1989]

ORDER

Now on this 17th day of April, 1989, comes on for consideration the proposed findings and recommendations filed herein on March 27, 1989, by the Honorable Beverly R. Stites, United States Magistrate for the Western District of Arkansas, and the objections thereto filed herein by the plaintiff's attorney on March 30, 1989.

The Court has reviewed this case de novo and has determined that the findings

and recommendations are correct and proper and should be adopted.

Accordingly, the court finds that plaintiff's motion for contempt should be and the same herein is denied.

/s/Franklin Waters
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 89-1714-WA

JERRY RUSSELL, JR., APPELLANT

V.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLEE

Order Denying Petition for
Rehearing and Suggestion for
Rehearing En Banc

Appellant's suggest for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

November 21, 1989

Order Entered at the Direction of the Court:

/s/Robert D. St. Vrain
Clerk, United States Court of Appeals,
Eighth Circuit.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

20 C.F.R. § 404.1720 (b) (4), provides in pertinent part:

> (b) **Charging and receiving a fee.** (1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.
>
> * * * *
>
> (4) If the representative is an attorney and the claimant is entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee directly to the attorney out of past-due benefits subject to the limitations described in § 404.1730 (b) (1). If the representative is not an attorney we assume no responsibility for the payment of any fee that we have authorized.

20 C.F.R. § 404.1730 (b), provides in pertinent part:

> (b) **Fees we may authorize--(1) Attorneys.** Except as provided in paragraph (c) of this section, if we make a determination or decision in favor of a claimant who was represented by an attorney, and as a result of the determination or decision past-due benefits are payable, we will pay the attorney out of the past-due benefits the smallest of--

(i) Twenty-five percent of the total of past-due benefits;

(ii) The amount of the fee that we set; or

(iii) The amount agreed upon between the attorney and the claimant represented.

20 C.F.R. § 404.501 (a) (8) provides in pertinent part:

(a) **In general.** Section 204 of the Act provides for adjustment as set forth in §§ 404.502 and 404.503, in cases where an individual has received more or less than the correct payment due under title II of the Act. As used in this subpart, the term "overpayment" includes a payment in excess of the amount due under title II of the Act, a payment resulting from failure to impose deductions or to suspend or reduce benefits under sections 203, 222 (b), 224, and 228 (c), and (d), and (e) of the Act (see Subpart E of this part), a payment pursuant to section 205 (n) of the Act in an amount in excess of the amount to which the individual is entitled under section 202 or 223 of the Act, a payment resulting from the failure to terminate benefits, and a payment where no amount is payable under title II of the Act . . . . The provisions for adjustment also apply in cases where through error:

* * * *

(8) A payment of past due benefits is made to an individual and such payment has not been reduced by the

amount of attorney's fees payable directly to an attorney under section 206 of the Act (see § 404.977).